Timothy M. Bechtold
Bechtold Law Firm, PLLC
P.O. Box 7051
Missoula, MT 59807-7051
406-721-1435
tim@bechtoldlaw.net

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,	)	**CR 23-98-GF-BMM**
Plaintiff,	)	**DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS COUNTS 1-20 FOR FAILURE TO EXHAUST TRIBAL REMEDIES**
vs.	)	
JAMES KIRBY KING,	)	
Defendant.	)	

Defendant James Kirby King is an enrolled member of the Fort Belknap Indian Community, therefore the United States is obligated to defer to tribal sovereignty and allow the Fort Belknap Tribal Court to adjudicate the charges against Mr. King. Because the United States did not allow the tribal court to adjudicate the charges against Mr. King, Mr. King moves the Court to dismiss the charges against him in this matter for failure to exhaust tribal remedies.

The United States argues that the Major Crimes Act, 18 U.S.C. § 1153(a), gives it jurisdiction to prosecute felony sexual abuse and incest crimes involving

Indian defendants in Indian Country, as well as child pornography and sexual exploitation of children crimes involving Indian defendants in Indian Country, thus there is no basis for deferring criminal prosecution of Mr. King to tribal court prior to prosecuting him in federal court on these charges. *See* Doc. 54 at 4-6.

In this case, Mr. King asserts his right as an enrolled member of the Fort Belknap Indian Community to be prosecuted in the tribal court of his tribe before a jury comprised of his peers, that is, members of the Fort Belknap Indian Community. Preemptorily subjecting Mr. King to federal prosecution under the Major Crimes Act before allowing the tribal court to investigate and prosecute him on these charges violates fundamental precepts of tribal sovereignty. Tribal criminal jurisdiction over tribal members, as an aspect of tribal sovereignty, predates the Constitution and does not depend upon it. *Talton v. Mayes*, 163 U.S. 378, 383–84 (1896). "The power of a tribe to prescribe and enforce rules of conduct for its own members does not fall within that part of sovereignty which the Indian implicitly lost by virtue of their dependent status." *Duro v. Reina*, 495 U.S. 676, 686 (1990)(cleaned up).

Mr. King is a member of an Indian tribe that retains those aspects of sovereignty that are "needed to control [its] own internal relations," which includes the right to "prescribe and enforce rules of conduct for its own members[.]". Federally recognized tribes continue to retain those aspects of sovereignty that are "needed to control their own internal relations, and to preserve their own unique

customs and social order." *Duro*, 495 U.S. at 685–86. Mr. King will not have a jury of his peers in federal court unless the Court selects a jury exclusively from members of the Fort Belknap Indian Community.

"[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). Thus, a jury must "be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861. "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The Supreme Court has "consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with ... traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982) (cleaned up).

Although the Great Falls Division of the District of Montana has four reservations within its boundaries, and a jury venire could conceivably have a small number of Native Americans from various tribes, Mr. King is entitled to a jury of his peers from the Fort Belknap Indian Community. In *Duren v. Missouri*,

439 U.S. 357, 364 (1979), the Supreme Court set out standards to determine whether a Sixth Amendment right is implicated when a "distinctive" group is underrepresented on a jury pool. Here, Mr. King argues that due to the particular sovereignty issues accorded to Native American tribes, as described above, he is entitled to a jury comprised of members of his community, the Fort Belknap Indian Community, and that comity requires that this Court allow him to be investigated and prosecuted on tribal court as an initial matter for crimes alleged to have been committed by him on other Native Americans on the Fort Belknap Indian Reservation. The *Duren* test, when applied to the Great Falls Division, would likely show that if a couple Native Americans are in the venire, the "distinctive" test will be met. When pitted against tribal sovereignty, however, the *Duren* test cannot control the analysis of Mr. King's right to be tried in his sovereign tribal court.

Mr. King, therefore, asks the Court to dismiss Counts 1 through 20 of the Superseding Indictment so that he may be tried in tribal court before a jury of his peers and tribal remedies be exhausted prior to bringing these counts against Mr. King in federal court. For these reasons, Counts 1 through 20 of the Superseding Indictment must be dismissed.

Dated this 14th day of July, 2024.

/s/Timothy M. Bechtold
Attorney for Defendant